



# Wisconsin Elections Commission

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## **TESTIMONY OF MEAGAN WOLFE FOR THE NOVEMBER 9, 2021, MEETING OF THE JOINT LEGISLATIVE AUDIT COMMITTEE**

### **I. Introduction**

Good afternoon. Thank you to co-chairs Senator Cowles and Representative Kerkman for the invitation to appear today. I am Meagan Wolfe, the non-partisan administrator of the Wisconsin Elections Commission, and I'm pleased to be here today.

Before I dive into the details, I want to take the opportunity to thank the staff of the Legislative Audit Bureau for their thorough and months-long investigation, which showed, once again, that the November 2020 election was accurate, safe, and secure.

I also need to make clear that the testimony I am providing today does not reflect the official response or position of the six-member, bipartisan Wisconsin Elections Commission.

In the interest of cooperation and transparency, I felt it was important for me to provide you with my analysis of the recommendations from the Legislative Audit Bureau. But, as the LAB report indicated, as the non-partisan administrator who does not have a vote on the commission, I cannot provide you with a formal response.

Only the bipartisan Commissioners can offer a formal response to the audit's findings. The chair of the Commission has modified the agenda of the upcoming December 1 quarterly meeting of the Commission to focus on the review of the audit and to consider the Commission's formal response.

Commissioners worked cooperatively to try to find an earlier time to meet to discuss their formal response, but because they are citizen members and face the competing demands of their full-time jobs, they were unable to find an earlier meeting time. The Commissioners consider this review important and recognized that their thoughtful review of the report requires a full day meeting. Other meetings that they scheduled had been pre-scheduled for a very short duration.

The purpose of my testimony today is to provide information to the Committee, as well as answer any questions you may have about the facts in the report, or the agency's related actions. I cannot provide the Commission's formal response, nor can I assume what action the Commission will take on the recommendations.

*Wisconsin Elections Commissioners*

Ann S. Jacobs, chair | Marge Bostelmann | Julie M. Glancey | Dean Knudson | Robert Spindell | Mark L. Thomsen

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*Administrator*  
Meagan Wolfe

I've structured my testimony today in the same way I will provide an overview and my recommendations to the Commission on December 1. I will also be taking note of questions, concerns, and information presented at today's hearing to provide the most comprehensive overview I can to the Commissioners at their December 1 meeting.

Again, I need to emphasize that the Commission may or may not agree with the items I recommend as part of the December 1 meeting. They may also choose to re-prioritize the order in which we address the recommendations.

Many of the audit report's recommendations require Commission action, meaning at least four votes of the six commissioners.

I expect that after the December 1 meeting, we will have a formal response from the Commission. By the date of March 2022 referenced in the LAB report, the Commission will certainly be able to provide an update on actions they have taken relevant to each recommendation.

Overall, my analysis of the report is that it confirms that there was no widespread fraud in the November 2020 election; that the WEC and Wisconsin's 1,922 municipal and county clerks followed required processes and election laws; and that the vote totals were accurate.

It's worth noting again that no major errors were identified that could have changed the outcome of the election.

The report highlights the close and effective collaboration between WEC staff and local election officials. Despite being the most decentralized election administration system in the country, we have provided training, technology, and guidance to our local election partners that they find useful in administering elections consistently across the state.

From my perspective many of the items in question are easy to implement and we are grateful to the LAB for the roadmap. Now, I will turn to the key sections of the LAB report on the 2020 General Election:

## **II. Training**

Regarding training issues, the LAB audit thoroughly reviewed the WEC training program and offered several recommendations. The report identified some areas for improvement but also overlooks essential context or an overview of the full extent of training WEC offered in preparation for the 2020 General Election.

The report provides an overview of in-person training WEC staff conducted at various locations throughout the state prior to the enactment of travel restrictions due to the COVID-19 pandemic. The pandemic limited both staff's ability to travel and the number of in-person training events held by municipal clerks' professional organizations. The report notes that WEC offered virtual

training for the remainder of 2020 but does not quantify those events as it does for the in-person training sessions.

Faced with administering high-turnout elections of intense public interest during a global pandemic, WEC staff worked directly with municipal and county clerks to provide training opportunities in multiple accessible formats. For example, staff presented training at several virtual clerk conferences, conducted 25 live webinars on various election-related topics, issued over 70 informational memos, updated 5 election-related manuals, provided 8 “Clerk Communications” documents that municipal clerks could use to conduct voter outreach, and administered core training required for certification of municipal clerks and chief election inspectors in multiple on-demand formats.

In some instances, training programs were offered at multiple times throughout the day to accommodate clerks who are part-time and have other responsibilities during standard state business hours. Staff also developed a regular conference call schedule for meeting with both county and municipal clerks throughout 2020 so that election officials across the state could be informed of the latest developments in election-related lawsuits that impacted the administration of the 2020 election cycle and have their questions answered.

The LAB report identified several issues with training-related administrative rules and made some suggestions for updating existing rules. Some of these recommendations, such as updating an existing rule to reflect the statutory change made to the training terms for municipal clerks and Chief Election Inspectors, are not controversial or complicated. Others will require staff to work with Commissioners to develop a plan for promulgating other required or suggested rules.

It is true that the WEC did not contact the head elected official for each municipality whose clerk did not meet training requirements prior to the start of the 2020 election cycle. Staff instead posted information regarding each clerk’s training status to the agency website and conducted outreach to non-compliant clerks to inform them of the training requirements and provide suggested training opportunities for them. This oversight will be corrected moving forward. Staff has developed a plan for meeting this requirement and will be contacting municipal officials about missing training hours after the current training deadline ends at the end of this year.

We were pleased to see that LAB’s review of training for election inspectors and Special Voting Deputies pointed out that those materials “contained relevant information.” WEC staff will work with the Commission to determine how they would like to proceed with promulgating any required administrative rules that prescribe the content of this training. I point out LAB’s comments on this training not to downplay the significance of the administrative rule-making process but to highlight that even without the required rule in place, accurate and relevant training was provided for training election inspectors and SVDs.

I would also highlight that clerk satisfaction with WEC-provided training was generally high, and only 1.9% of surveyed clerks felt “somewhat unprepared” to conduct the election. While that number is very low, staff will review the concerns cited by those clerks and update the training

program to account for those concerns. Training of municipal clerks in a decentralized election administration system, such as Wisconsin's, will always be a challenge but we welcome the opportunity to work with the Legislature to identify any additional areas for improvement.

### **III. Maintenance of Voter Registration Records**

The LAB report provides five recommendations regarding the maintenance of voter registration records. Four of the five recommendations suggest closer relationships with our existing partners: Department of Transportation (DOT), Department of Health Services (DHS), Department of Corrections (DOC), and the Electronic Registration Information Center (ERIC). A fifth recommendation suggests a change to the duplicate record identification process. In broad terms, the Voter Registration Records recommendations are very reasonable and largely consist of processes already underway at the agency.

This section of the report begins on page 20 with a discussion of some of the many sources of data within the statewide system. The section begins by stating, "statutes require the WEC to maintain WisVote." The statutes require the agency to maintain a voter registration system, not WisVote. It's worth noting that WisVote is a multifunction system with capabilities far exceeding the statutory minimum requirement.

WisVote is a comprehensive elections management system that provides clerks with tools to plan elections, designate and staff polling places, create wards and districts, manage addresses, and even track the staff training. These are all functions that the WEC developed over time to assist clerks and help standardize administrative processes. Development of WisVote has never stopped and the WEC will continue to implement improvements when needs are identified – whether by the Commission, clerks, auditors, elected officials, or the general public.

There are some errors in the Voter Registration Records section that could cause misunderstandings. This analysis will only highlight the elements that most directly impact the substance of the LAB recommendations.

#### **A. Data Exchange Agreements**

Three of the LAB recommendations are to renew data exchange agreements with partner state agencies (DOT, DHS, DOC). The WEC agrees that data exchange agreements are worthwhile and initiated discussions with all three partner agencies prior to the LAB report. In the interim, all agencies have agreed that the current data sharing mechanisms are satisfactory, but all sides are open to improving the process.

Wis. Stat. § 85.61 requires only that the WEC maintain a written data exchange agreement with the Department of Transportation. This agreement was current and in effect at the time of the November 2020 General Election. Statutes do not require the WEC to maintain written agreements with the Department of Corrections or the Department of Health Services. However, all three agencies are close partners and WEC staff coordinate with them frequently.

## B. Signature Matching

The agency's relationship with DOT is directly relevant to one LAB recommendation that overlooked some critical facts. On page 24 of the report the LAB recommended that the WEC:

- *comply with statutes by working with the Department of Transportation to obtain the electronic signatures of individuals who register online to vote, or request that the Legislature modify the statutory requirement that the Wisconsin Elections Commission obtain them.*

This section is likely referencing Wis. Stat. § 6.30(5) regarding the electronic application process for registration.

The LAB report goes on to state, "WEC's staff indicated that no signatures were obtained from DOT, in part, because a significant amount of electronic space would be needed to store them." (LAB report page 23.) The words "in part," reference the omission of some critical facts.

The online voter registration (OVR) system was developed and implemented in accordance with 2015 Wisconsin Act 261 (Act 261), which amended subsections of Chapter 6 of the Wisconsin Statutes. Pursuant to Act 261, WEC staff provided five quarterly reports to the Wisconsin Legislature regarding the development of the OVR system. The last report, indicating system implementation, was submitted to the Wisconsin Legislature on January 12, 2017. The final requirement under Act 261 was the Commission's determination that the OVR system was complete. The Wisconsin Elections Commission unanimously certified the system on March 14, 2017.

The Act 261 quarterly progress reports for the Wisconsin Legislature, and the Commission's ultimate certification on March 14<sup>th</sup>, repeatedly and very clearly established that the Department of Transportation shall be the custodian of voter signatures. The final implementation report stated:

*The voter's signature is not included as part of the MyVote OVR process but is instead available to WEC from WI DOT's database as needed. The Commission approved this approach at its December 2016 meeting. (WEC Commission Meeting Materials, March 14, 2017)*

Put simply, the Wisconsin Legislature, the Elections Commission, and the Department of Transportation each recognized that there was no rational reason for the State of Wisconsin to spend hundreds of thousands of dollars (ultimately millions over time) to maintain duplicate sets of data that were already: (1) in the State's possession; (2) professionally secured; (3) backed up and (4) readily available to the WEC if needed.

In a subsequent section of the LAB report, on page 41, the LAB appears to imply that election officials should use DOT data to perform signature matching, although there is no basis in law for this assertion.

### **C. Duplicate Records**

Wisconsin clerks are asked to review potential duplicate records that the agency flags for review. Duplicate records are a common and normal circumstance. Each time a person moves within the state and re-registers they may create a duplicate registration record (one at their old address and one at their new). Even moving to a new apartment in the same town will create a new record. In 2020 alone the statewide system efficiently processed over 250,000 duplicate matches.

The LAB identified 70 pairs of driver's license numbers in the statewide system. With few exceptions, these were pairs of entirely unrelated voters where one person had the correct license number and the other had a license number that was one or two characters off. Further analysis by WEC staff showed that 68 of the pairs could be easily confirmed as typographical human errors. The remaining two pairs were further evaluated for any indication of illegal behavior. WEC staff found evidence of possible double voting associated with one of the remaining pairs. Upon contacting the municipality involved, staff learned that this case had been identified and referred for criminal prosecution several months earlier.

All duplicate license numbers have been corrected, and WEC staff are implementing the LAB's suggestion to conduct a periodic review of the system for duplicate driver's license and state identification card numbers.

### **D. Deaths and Felons**

The LAB report included no recommendations regarding the processing of death and felon notices. However, the body of the report included several misleading presentations. Most notable are Tables 3 and 4 on pages 27 and 29, respectively.

Each of these tables includes a bolded line indicating, "Clerks Made No Determinations," and suggests that Wisconsin's clerks were somehow negligent. Nothing could be further from the truth. The LAB hints at the truth with a footnote, revealing that nearly all of the records were already deactivated. The overwhelming majority of clerks made no determination because no determination was required – the voter was no longer registered to vote.

On page 26 of the report the LAB stated:

*If a clerk does not act on a potential [death] match for a given individual, WEC's staff are uncertain if a clerk determined whether an individual is still alive and, therefore, whether the voter registration record is accurate. (LAB Report page 26)*

This is incorrect. WEC staff possess a great deal of information about each record – most importantly the record’s active or inactive status. Indeed, the LAB almost immediately acknowledges this in a subsequent sentence:

*Although the data indicated that clerks had not acted on the potential matches, other data provided by WEC’s staff indicated that, in fact, clerks had inactivated the records of 12,406 of the 12,565 individuals (98.7 percent) as of the November 2020 General Election and had inactivated the records of all but 8 of the 12,565 individuals as of June 2021. (LAB Report page 26)*

The data, therefore, very clearly indicates that Wisconsin’s local election officials are incredibly diligent in their duties and expertly managed the enormous volume of data they were forced to contend with ahead of the 2020 General Election.

## **E. ERIC**

The LAB report discusses reports obtained from the Electronic Registration information Center (ERIC) beginning on page 31. This subsection concludes on page 34 with a recommendation that the WEC:

- *work with the Wisconsin Elections Commission to establish a schedule for regularly obtaining each type of data available from the Electronic Registration Information Center and a plan for acting on these data . . . (LAB Report page 34).*

The WEC concurs fully.

Unfortunately, the LABs discussion of ERIC contains numerous inaccuracies. In particular, the ERIC data chart on page 32 (Table 5) implies that Wisconsin missed many opportunities to obtain data. This is absolutely wrong. In fact, the WEC obtains all ERIC data sets when they are made available to Wisconsin, with the full approval of the Elections Commission, and in full compliance with statutory requirements. Each ERIC report has specific periods of availability and several of the reports did not even exist when Wisconsin first joined ERIC. For example, the duplicate records report is a relatively recent creation only made available after a General Election. Likewise, the data analyzing multiple voters was not available to Wisconsin prior to 2018. WEC staff communicate with ERIC almost weekly, actively participate on the ERIC Board of Directors, and fully conform to the ERIC user agreement. The LAB report summary misleadingly implies the agency is noncompliant.

Per the ERIC agreement, members must:

1. Upload data to ERIC at a minimum of every 60 days (WEC does this every 30 days)
2. Request List Maintenance Reports, at least 1 report every 425 days, ERIC recommends at least once a year. (WEC does this quarterly)
3. Act on and certify List Maintenance Reports, initiate contact within 90 days after data sent

4. Request and act on Eligible but Unregistered Reports, initiate contact by Oct. 1 or 15 days before close of registration of the next Federal General Election

Finally, the comparison to other states starting on page 34 is out of place. The LAB could have accurately substituted “Wisconsin” for each of the statements they included.

- ~~Illinois~~ *Wisconsin* indicated that it regularly obtained all types of the available data, as required by its statutes, including some types as frequently as six times per year and other types as infrequently as once every two years (note: Wisconsin exchanges data with ERIC almost monthly);
- ~~Iowa~~ *Wisconsin* indicated that it annually obtained some types of the available data and planned to obtain all types of the available data each month beginning in 2022;
- ~~Michigan~~ *Wisconsin* indicated that it obtained some types of the available data every 18 months to 24 months; and
- ~~Minnesota~~ *Wisconsin* indicated that it obtained all types of the available data each month.

#### **IV. Absentee Ballots**

The increase in absentee voting caused by the COVID-19 pandemic was one of the biggest challenges Wisconsin election officials faced in 2020. The LAB audit provides statistics that demonstrate the incredible increase in absentee voting, but the report does not acknowledge that the cause of the increase in absentee voting was due to public health concerns caused by the COVID-19 pandemic. These concerns caused historic numbers of eligible voters to cast absentee ballots and request secure ways to return their completed ballots. During this unprecedented time, the Commission issued guidance to provide clarity to voters and help election officials conduct a safe, secure, and accurate election during a pandemic. Much of this guidance is reviewed in the report, and the WEC is committed to identifying actionable issues that should be improved.

The LAB report identifies two concerns over the absentee ballot certificate envelope used to return absentee ballots in Wisconsin. The same certificate is used for absentee voters who cast their ballot by mail and for those who vote in-person in their clerk’s office prior to election day. State statute outlines the requirements for the certificate envelope and the WEC prescribes a template form that can be used by municipal clerks when administering absentee voting.

The first concern identified in the audit report addresses the format and requirements of the certificate envelope. Specifically, the LAB recommends that the Commission ensure that the absentee ballot certificate template made available to municipalities requires witnesses to print their names on the certificate. State law provides that the certificate envelope should have a field



for the printed name of the witness. Statute also lists the reasons to reject an absentee ballot. A missing printed name of a witness is not one of them. In 2017, the Commission approved the version of the certificate envelope used for the 2020 General Election and that revision did not include the printed name field for the witness. Staff expect the Commission to review the certificate envelope requirements again and determine if any changes are needed.

The report also discusses guidance issued by the Commission in 2016 in reference to absentee ballots returned to municipal clerks with missing or incomplete witness address information. The requirement for witnesses to provide their addresses was new in 2016 and statute does not define what constitutes a complete address for this purpose. The Commission received concerns from municipal clerks regarding the implementation of this new requirement and, in response, issued guidance directing clerks to add missing witness address information to a certificate envelope if they can obtain that information from the voter or find it through other sources such as the voter rolls or municipal tax records. The guidance remains in place today. Staff will work with the Commission to determine if any changes to this guidance or the promulgation of administrative rules are appropriate for these situations.

The use of secure drop boxes for absentee ballot collection is another area where LAB recommends WEC staff work with the Commission on a potential administrative rule. While drop boxes in various forms have been used in Wisconsin elections for years, they gained popularity last year due to the increase in by mail absentee voting. Clerks and voters were looking for secure ways for absentee ballot return that were convenient and trustworthy. In response to this, the Commission directed staff to provide best practices regarding the establishment, monitoring, emptying and security of drop boxes, which also incorporated recommendations from a resource developed by the U.S. Cybersecurity and Infrastructure Security Agency (“CISA”) and other experts on elections infrastructure. In practice, many clerks repurposed existing drop boxes used for tax collection or municipal billing purposes to collect absentee ballots prior to the general election, while others established drop boxes specific for this purpose. This issue is currently being litigated and staff will work with the Commission to implement any decision issued by the courts when the case is resolved. WEC is also willing to work with the legislature on further legislation that would regulate the use of drop boxes in Wisconsin elections.

The WEC first discussed Special Voting Deputies in relation to the COVID-19 pandemic prior to the April 7, 2020, Presidential Preference Vote and Spring Election. WEC staff received reports from municipal clerks in early March that facilities normally served by SVDs were closed to visitors due to the COVID-19 pandemic and that SVDs would not be granted access. Care facilities stated an obligation to protect their residents from exposure to the virus following reports that COVID-19 had disproportionately impacted nursing home and care facility residents. These issues continued throughout the 2020 election cycle where municipal clerks, public health officials and advocates for the aging and disability communities all provided information to the Commission that SVDs would not be allowed into care facilities to administer voting. Rather than waste precious time that voters in these facilities need to receive, vote and return their absentee ballots, the Commission directed clerks to proceed with the statutory process allowing

absentee ballots to be sent to residents normally served by SVDs if those deputies are not available or unable to access the facility during SVD voting periods. Statute does not provide the Commission, municipal clerks or SVDs the ability to require a facility to grant them access to conduct voting with residents. This reality prompted clerks to request uniform guidance from the Commission in these situations.

LAB recommends that the Commission promulgate an administrative rule that addresses these situations. WEC already undertook the process of drafting an emergency rule regarding this issue in the spring of 2021, but the Commission opted not to further pursue the rulemaking process after the election was completed. The future of that proposed rule's guidelines and procedures may be revisited for future pandemic-impacted elections, or on a longer-term basis for other emergencies. The Commission will have to determine the necessity for such action at its meeting Dec. 1. They have, however, already added an item to their legislative agenda that would define SVDs as essential visitors in situations where public access to these facilities is restricted.

## **V. Ballot Processing**

Agency staff have also reviewed the recommendations on page 62 of the report regarding polling place relocation, the retraction of previous guidance on the topic, and the promulgation of a related administrative rule for future elections. It is important to note that the Commission met March 12, 2020 and approved the polling place guidance based upon the then-emerging pandemic and the issuance of Executive Order #72 by Gov. Evers that same day. The executive order proclaimed a public health emergency, and those orders had not yet been evaluated by a court, or other relevant parties, as the pandemic progressed.

The Commission directed staff to provide additional instruction to clerks regarding necessary process adjustments after the March 12<sup>th</sup> meeting. The following motion was passed by a 6-0 vote in that public session:

In light of Executive Order #72 and directives of the Department of Health Services, the Commission finds that it is impossible or inconvenient for municipalities to conduct Election Day voting at nursing homes, other care facilities, and other facilities as designated by the Department of Health Services or local health officials. The Commission finds that the municipal clerk or municipal elections commission executive director may relocate such polling places without obtaining the prior approval of the local governing body or municipal elections commission.

WEC staff believe the guidance at issue pertained only to the April 2020 election. That said, the concept of guidance retraction will be brought before the Commission at the December 1<sup>st</sup> meeting. Agency staff will also present possible Commission action items relating to the distribution of clarifying memoranda, and also discuss the potential need for a long-term administrative rule or addition to the Commission's legislative agenda to account for future

pandemics, natural disasters, and similar catastrophic events that impact polling place locations or necessitate last-minute changes.

The 12-page memorandum issued to all Wisconsin Election Officials on October 22, 2020, informed clerks and board of canvass members that Wis. Stat. section. 7.51(1) requires canvasses to be continuous – meaning no adjournment until the canvass of all ballots cast and received on or before election day is completed. The single sentence the LAB objected to in the memo was included because local election officials were asking the WEC what to do if election inspectors who had not yet completed the canvas became unable (due to health and emergency conditions) to continue late into the night. This single sentence tried to account for this real, on-the-ground contingency. The rest of the memorandum clearly stated that election officials could not adjourn and had to keep going until the canvass was done.

The issue and any next steps will be discussed with the Commission at its December 1 meeting.

## **VI. Electronic Voting Equipment**

We were pleased to see that LAB's review of the voting equipment certification process did not generate any recommendations for changes to that program. State law and administrative code requires the WEC to act as the certification entity for electronic voting systems. All systems, or equipment, used to tabulate votes must be certified prior to their use in Wisconsin elections. Voting systems used in Wisconsin are certified on the federal level in addition to the state-level certification conducted by WEC.

Voting equipment was required to be used by all municipalities for the 2020 general election and LAB's review did not uncover any anomalies that would call into question how votes were tabulated for that election. Once a voting system is certified for use in Wisconsin, administrative procedures allow for updates to a system that do not require a full certification test campaign and LAB's review did not identify any issues with the process WEC used to approve changes to these systems prior to election day.

The report contains several recommendations for additional, updated or more in-depth training on several areas of voting equipment functionality that are not required by law. While suggestions, such as the one regarding training on the public test on page 73 of the report, are welcome, I would like to point out that multiple options for training on this topic already exist for use by Wisconsin election officials.

These options include references in the election calendar WEC produces, manuals and videos, and Webinars. Public test requirements are often reviewed during a webinar WEC holds prior to each statewide election. Staff, however, acknowledge there is always room for improvement and are currently exploring ways to provide improved training on these topics. Any updated training materials will include an emphasis on the timeline for conducting a public test and a reminder that each test deck used to conduct the test has requirements to include overvoted ballots. A more

comprehensive voting equipment security training is being planned that will also emphasize the review of tamper-evident seals both prior to the opening of polls and at the close of polls.

## **VII. Administrative Rules (Generally)**

Staff will also work with the Commission to determine the scope and contents for the required administrative rule regarding voting equipment security. Commission staff acknowledge that a significant portion of the audit report's recommendations focus on the need to promulgate administrative rules, including several specific areas ripe for administrative rule promulgation. Many of these recommendations, on their face, appear to be quite reasonable. Each recommendation will be brought before the Commission at its December 1<sup>st</sup> meeting.

I will provide some historical context and background information on administrative rulemaking at the WEC. The statutory authority vested in the bipartisan Commission is unique and broad when compared to other state agencies. For instance, certain rulemaking and guidance-based authority is specifically granted in statute:

- Wisconsin Statutes § 5.05(1) provides that, "The elections commission shall have the responsibility for the administration of chapters. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing." This authority encompasses several components, ranging from interpretation of elections laws and complaint decision-making functions to the promulgation of administrative rules on the subject.
- Wisconsin Statutes § 7.08(3) adds that the Commission shall, "Prepare and publish separate from the election laws an election manual written so as to be easily understood by the general public explaining the duties of the election officials, together with notes and references to the statutes as the commission considers advisable."

However, Wis. Stat. § 5.05(1e) also dictates that, "Any action by the commission, except an action relating to procedure of the commission, requires the affirmative vote of at least two-thirds of the members." This means that staff cannot unilaterally consider the recommendations found in the audit report, determine whether guidance or administrative rules were/are appropriate, or recommend the submission of a scope statement to begin the rulemaking process. The LAB acknowledged as much in the audit report when it stated that, "...WEC's administrator has limited authority to act without WEC's involvement."

Members of the Commission, and of the Commission's predecessor boards, have often considered the extent to which statute and case law grants them authority to consider and issue guidance on elections statute interpretation. The audit report makes it clear that the Commission will also need to discuss its future approach to guidance and administrative rulemaking in December. I also need to note that several ongoing or potential court cases and complaints are pending on topics that have administrative rule and statutory interpretation implications (for example, the use of drop boxes, ballot return processes, use of special voting deputies, etc.).

Judicial decisions, appeals, and other legislative activity may individually or collectively impact or delay Commission decisions on audit report recommendations and the authority of the Commission itself. WEC staff and Commissioners will continue to assess these matters and ensure outcomes progress as quickly and appropriately as possible.

### **VIII. Administrative Rules On Equipment And Software Security**

WEC staff have begun to examine the recommendations on page 78 of the audit report which detail the need for administrative rule promulgation pertaining to electronic voting equipment and software security. Wisconsin Administrative Code Chapter EL 7 already deals extensively with electronic voting system approval and testing requirements, both in Wisconsin and nationally. Applications for approval of electronic voting systems require, among other things, an itemization of all specifications for hardware/firmware/software, technical manual reviews, independent testing requirements that ensure conformance with all standards required by the federal elections commission, and a listing of other jurisdictions using the systems.

Chapter EL 7 also formalizes the processes for internal WEC staff testing of the voting systems while noting the circumstances under which system approval may be revoked, reconsidered, or otherwise examined. WEC staff will present the audit report's findings relating to election equipment and security to the Commission at the December meeting. The Commission will examine what, if any, additional administrative rules may be necessary, specifically on the topic of software security and voting systems.

This LAB recommendation is particularly relevant, as the topic was previously explored by the Commission several years ago. A motion was passed formally authorizing staff to act and move forward with rule promulgation. A scope statement was submitted that contemplated the addition of a ballot and electronic voting equipment security provision to existing administrative code. This action was part of a larger effort to consolidate the old Chapter GAB 5 into the new administrative code provisions, while also minimizing overlap and bringing sections 5 and 7 together into one. The scope statement for this proposed rule/chapter expired without formal promulgation on March 5, 2020, but the Commissioners may opt to resume promulgation of relevant portions of that prior attempt, while also considering any new components.

### **IX. Post-Election Audit**

The section on the post-election voting equipment audit acknowledges that statute does not provide for how the post-election voting equipment audit is conducted. Instead, it requires a performance audit of the equipment used to tabulate votes in each General Election and leaves the specifics of the audit to WEC to determine.

WEC has made significant changes to both the sample size and timeline for completion of the audit over the past few general elections to improve the effectiveness of this requirement. The Commission has increased the sample size to 5% of all reporting units statewide and required that at least one piece of equipment is audited from each county. Prior to the 2018 General

Election the Commission adopted staff recommendation that the audit should be completed prior to the certification of election results and this timeline was also used for the 2020 General Election.

The report discusses an issue identified during the audit where creases on absentee ballots in some instances caused issues with the equipment. Staff were proactive in identifying this issue and requested ballots and election materials from one audited jurisdiction who experienced this problem to verify the reconciliation problem. WEC then expanded this research and requested materials from all jurisdictions who used this equipment and had it programmed the same way for the 2020 General Election. The result of this investigation was an amended certification issued by the Commission of this specific system that will not allow this problem to occur in the future.

The report also indicates that better training can be provided by voting equipment vendors regarding voting equipment ballot jams and determining whether a ballot has been counted when the jam notification screen appears. Staff will work with the Commission to determine how best to address this issue, including additional certification requirements that focus on training.

The final recommendation in this section concerns the calculation of an error rate for each type of equipment used in Wisconsin for a General Election. LAB indicated staff did not provide this information to the Commission as required by statute. The final audit report did contain a discussion of errors identified during the audit and explained the probable cause of each error.

The report also includes a discussion of how the error rate, as defined by statute, is based on 2002 federal standard for initial system certifications and how this standard does not account for anomalies caused by voter marked ballots used during a live election. Staff did not provide a precise error rate for each piece of equipment because statute does not properly define what constitutes an error and does not account for issues when human error complicates the review. Staff will work with the Commission to define an error in future audits and determine whether a precise error rate can be calculated.

## **X. Complaints and Concerns Filed with WEC**

Wisconsin statutes, administrative code provisions, and authority delegated to the Administrator in consultation with the Chair and the full Commission, set forth the procedures for handling Wis. Stat. Section 5.05 and Wis. Stat. Section 5.06 complaints. While the LAB makes recommendations related to concerns that are not filed as complaints, there is no statutory requirement that the Commission provide a section on its website to accept election related concerns, but the WEC uses the “Report a General Concern” section to identify broad trends within the concerns and to triage specific issues that may emerge.

Election concerns are not sworn complaints, and in many instances the information received through the “Report a General Concern” area of the website is opinions from voters or statements about what people may have seen in the news that do not require any action or

response by WEC staff. Items that do require a response from WEC staff are sent out to the appropriate staff members and their supervisor. The WEC is informed of the number of concerns that are received, topic trends, and other issues that the full Commission needs to be aware of to potentially discuss in a meeting. Additionally, requests to send a message to the full Commission on a particular topic are provided on a semi-regular basis.

The acquisition of software to help manage contacts with the public and to help ensure consistent responses to common questions may help with tracking some of the concerns received through the website, but any additional tracking or reporting of these website concerns would need to be decided by the Commission. Commission staff will certainly discuss tracking capabilities within the software with the Commission and decide what additional reporting to the Commission may be needed, if any, to keep them informed.

Updates to administrative rules governing complaints will also be discussed with the Commission at its December 1st meeting. The current administrative rule in place for complaints was superseded by statute for Wis. Stat. Section 5.05 complaints, as the statute provides a detailed set of procedures, including how the complaint must be filed, how soon a respondent must respond, the burdens of proof, the types of decisions the Commission can make in response to a complaint, etc. While the agency staff will discuss this issue with the Commission, it is not clear what additional information should be included in this recommended rule that is not present within the statute itself.

WEC staff complied with required statutes and responded to an unprecedented number of public contacts and sworn complaints during four statewide elections in 2020 conducted during a worldwide public health crisis.

## **XI. Conclusion**

In closing, I will be taking notes from today's hearing and will incorporate feedback and discussion into the staff report and recommendations that go before the Commission on December 1.

I also feel obligated to point out that many of the questions and issues we are dealing with here today could have been avoided had the LAB followed its normal practice of sharing a draft version of the report with the agency being audited before releasing a final version of the report. Had we been given a chance to correct the numerous misunderstandings as part of reviewing a draft report, we could have avoided the spate of incorrect information that has been repeated publicly by legislators, the media, and others.

Related to that point, I want to reiterate our request for clarity regarding opportunities to provide the LAB with the Commission's official response to the audit report. We need to know if the Commission's official response will be included and posted with the report.

We would also ask for clarity on whether we can submit proposed corrections to the LAB report and whether the LAB will make those corrections or include them as an addendum.

Answers to these questions will allow me to ensure that the Commission submits its response and request for corrections in the proper format.

Again, I want to thank Senator Cowles and Representative Kerkman for the opportunity to provide testimony today. I also want to extend my appreciation to Legislative Audit Bureau staff for their hard work compiling the audit report.

The LAB report highlighted several opportunities for us to improve election processes and procedures to continue Wisconsin's legacy of accurate and secure elections for years to come.